IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 261 of 1998

WITH

CIVIL APPLICATION NO. 5429 OF 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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AHMEDABAD MUNICIPAL CORPORATION

Versus

AMBALAL TRIKAMLAL BAROT

Appearance:

1. Appeal from Order No. 261 of 1998

MR PRASHANT G DESAI for the Appellant

MR YASHWANT S BAROT for the Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 11/04/2002

ORAL JUDGEMENT

Admitted. Mr. Yashwant S Barot appears and waives service of notice of admission on behalf of the respondent.

2. In the peculiar facts and circumstances of the case and with the consent of the learned advocates appearing for the parties this matter is taken up for final hearing today and is decided by this judgement.

3. In this Appeal from Order which is filed under Order 43 Rule 1(r) of the Code of Civil Procedure ('the Code' for short), appellant/defendant seeks to challenge the order dated September 23, 1997 recorded below application Exhibit-6, notice of motion, in Civil Suit No. 5603 of 1996 by the learned Auxiliary Chamber Judge, Court No.18, City Civil Court, Ahmedabad by which application Exhibit-6, notice of motion, filed under Order 39 Rule 1 & 2 of the Code by the respondent/plaintiff against the appellant/defendant for issuing mandatory direction to the appellant/defendant to provide alternative arrangement as per resolution No. 2658 dated March 23, 1989, sanctioned by it, came to be granted by issuing mandatory direction as prayed for.

4. The respondent has filed suit against the appellant for mandatory injunction directing it to provide alternative arrangement as per resolution No. 2658 dated March 23, 1989, sanctioned by it. Along with the suit, application Exhibit-6, notice of motion is taken out by the respondent for the similar relief which has been claimed in the suit.

5. The appellant, on filing appearance, has contested the application Exhibit-6, notice of motion by filing written objections wherein, inter alia, all the averments made in the application have been denied and claimed that the relief in the nature of mandatory injunction claimed in the application Exhibit-6, notice of motion, which is similar to the relief claimed in the suit, cannot be granted at an interlocutory stage and, therefore, prayed to dismiss the application Exhibit-6, notice of motion.

6. The learned Judge of the lower Court, after hearing the learned advocates appearing for the parties and, on analysis, appreciation and evaluation of the pleadings and documents, came to the conclusion that since the respondent is ready and willing to accept the premises sanctioned vide resolution No. 2658 dated March 23, 1989, the controversy between the parties does not survive and, resultantly he has granted the prayer of mandatory injunction directing the appellant to provide alternative arrangement as per resolution No. 2658 dated March 23, 1989 sanctioned by it, which has given rise to

the present Appeal from Order, at the instance of the defendants.

7. I have heard Mr. Prashant G Desai, learned advocate for the appellant and Mr. Yashwant S Barot, learned advocate for the respondent. I have also perused the averments made in the memo of the Appeal, grounds set out therein and the impugned order which is the subject matter of challenge in this Appeal from Order.

8. The only question which is called for determination in this Appeal from Order is; as to whether Court can grant the interim relief which is the final relief claimed in the suit, without adjudicating the claim raised by the plaintiff in the plaint and the defence raised by the defendant in the written statement?

9. At the outset, there is no dispute that the respondent has claimed the relief in the suit which is a mandatory injunction directing the appellant to provide alternative arrangement as per resolution No. 2658 dated March 23, 1989 sanctioned by it. There is also no dispute that a similar relief is claimed in application Exhibit-6, notice of motion. The learned Judge of the lower Court, has, merely, on the basis of the submissions made by the respondent that he is ready and willing to accept the premises sanctioned vide resolution No. 2658 dated March 23, 1989, held that the controversy between the parties does not survive. I fail to understand how the learned Judge has reached to such a conclusion merely on the basis of the submissions made by the respondent when the appellant has contested application Exhibit-6, notice of motion by filing written objection. Therefore, I am of the view that the learned Judge of the lower Court has committed an error in law and in facts in deciding the application Exhibit-6, notice of motion in favour of the respondent.

10. It is settled principle of law that Court should not grant the interim relief which would amount to decreeing the suit without adjudicating the claim raised by the plaintiff in the plaint and defence pleaded by the defendant in the written statement. The aforesaid principle is enunciated by the Supreme Court in the case of BANK OF MAHARASHTRA V. RACE SHIPPING & TRANSPORT CO. PVT. LTD., AIR 1995 SC 1368. It is held by the Supreme Court that the practice of granting interim orders which practically gives the principle relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of

other considerations is deprecated.

11. Applying the principles laid down by the Supreme Court in the above referred to judgement to the facts of the present case, I am of the opinion that in this case the learned Judge has granted interim relief which is amounting to decreeing the suit without adjudicating the claim raised by the respondent in the plaint and the defence pleaded by the appellant in the written statement. Such a relief is not called for on the facts and in the circumstances of the case, therefore, I am of the view that the relief claimed by the respondent in application Exhibit-6, notice of motion, cannot be granted. The learned Judge has committed an error in law and in facts in granting such a relief, therefore, this Appeal from Order deserves to be allowed by quashing and setting aside the impugned order by rejecting the application Exhibit-6, notice of motion.

12. For the foregoing reasons, the Appeal from Order succeeds and accordingly it is allowed with no order as to costs. The order dated September 23, 1997 which is impugned under appeal, granting mandatory injunction in favour of the respondent, is quashed and set aside. The application, notice of motion is rejected.

13. Since the Appeal from Order is allowed and thereby application Exhibit-6, notice of motion is rejected, Civil Application No. 5429 of 1998 which is filed for stay of the impugned order, now does not assume any survival value, hence the same is also disposed of accordingly with no order as to costs.

14. It is made clear that no observation made by this Court while allowing this Appeal from Order shall be construed as an expression of opinion on the merits of the case. The learned Trial Judge shall decide the suit on the basis of the evidence adduced and produced before him in accordance with law and uninfluenced by the fact that the Appeal from Order filed by the appellant/defendant is allowed and thereby application Exhibit-6, notice of motion came to be rejected.

(A.M.Kapadia, J)

Jayanti*